Filed 8/24/04 P.v Cates CA3

NOT TO BE PUBLISHED

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

THIRD APPELLATE DISTRICT

(Calaveras)

THE PEOPLE, Plaintiff and Respondent, v. JAY EDWARD CATES, Defendant and Appellant.	C044081 (Super. Ct. No. F2540)

A jury convicted defendant Jay Edward Cates of first degree murder (Pen. Code, § 287, subd. (a)) in the death of his ex-girlfriend, Keri Raspberry. The trial court sentenced him to prison for 25 years to life.

Defendant argues on appeal that his sentence should be reduced to second degree murder because the trial court erred in admitting the statements he made to a Stockton police detective during the investigation, and in excluding the evidence he offered to impeach the testimony of a key prosecution witness. Defendant also contends the combined effect of these alleged

errors warrants reversal of the first degree murder verdict. (AOB 28) We shall affirm the judgment.

FACTUAL AND PROCEDURAL BACKGROUND

Defendant's girlfriend, Keri Raspberry, disappeared on October 6, 2001, the day after she told him to move out of her apartment. Raspberry was 40 years old, five feet tall, weighed 105 pounds, and suffered from bipolar disorder. She had a habit of "disappearing" and checked herself into a hospital on at least one occasion while defendant lived with her.

Raspberry telephoned her mother, Margaret Maisel, around 12:45 p.m. on October 6th to cancel dinner plans. She said defendant asked her to give him a ride. When Maisel asked her daughter where she was, Raspberry said she would tell her later. She had, in fact, driven defendant to the home of his friend, Jeffrey Kline, in Valley Springs. Defendant went inside while Raspberry waited in the car. He told Kline that he and Raspberry were going camping near Big Trees. He wanted to sell some tools for cash. Defendant also mentioned that Raspberry wanted him to move out. He told Kline he did not know where he was going to live. Kline later testified that defendant seemed stressed and worried.

Defendant retrieved a tool box from the car, removed a wrench, handed Kline the remaining tools, and left. Kline noticed a tent in the hatchback portion of the car. Defendant's daughter, Johnna Elwood, had loaned him the tent in March or April 2001.

Kline received a telephone call from defendant later the same evening. Calling from a pay phone in Stockton, defendant asked Kline to take him to his son's wrestling match. Kline agreed. He picked up defendant at Denny's. When they reached the fairgrounds, defendant retrieved a bag of clothes from his son's car and watched the match for about 30 minutes. Defendant stayed the night with Kline in Valley Springs. Kline's wife drove him back to Stockton the next morning.

Defendant spoke with Elwood after the police began investigating Raspberry's disappearance. He asked her not to say anything about the tent. Elwood responded, "Why[,] is she in it or something?" Defendant said, "I don't know, it's just not in the car." When Elwood asked her father if he knew where Raspberry was, he responded "maybe . . . ." She then asked if Raspberry was alive. Defendant said she was "probably dead" and "not living."

A short time later, defendant appeared at Kline's home again. Kline did not recognize defendant because he had cut his hair. The discussion turned to Raspberry, and Kline jokingly asked, "What did you do kill her and dump her body in the woods?" Defendant did not respond immediately, but later stated he did not know where she was.

When Maisel did not hear from Raspberry after October 6th, she and other family members started checking her apartment. Some time later, a friend of Raspberry's spotted her car near the apartment. Maisel found the car unlocked and cleaner than usual. The front seat was set all the way back. Maisel locked

the car, returned to her own car, and waited. About 45 minutes later, she saw defendant approach Raspberry's car. After walking around it, defendant opened the door with a key and drove away. Maisel attempted to follow, but eventually lost sight of the car. She received word later that night that the car had been found and towed.

Defendant went to visit his cousin, Billy Freeman, while Raspberry was missing. Freeman described defendant as "real stressed" about Raspberry's disappearance. He tried to raise defendant's spirits by suggesting that she would "turn up." Defendant responded, "no, she won't." Freeman asked if defendant knew where she was, and defendant said that he did. When Freeman asked if Raspberry was alive, defendant responded, "No." Freeman asked if it was an accident, and defendant said, "No." He then recounted the details of the murder. Freeman was "blown away" by defendant's story because he had never known defendant to be violent. He reported the information to police.

A local resident found Raspberry's body in the woods above Big Trees on October 28, 2001. The badly decomposed body was partially covered by the tent defendant borrowed from his daughter. There was a large hole in the back of Raspberry's skull which may have caused her death. There was also evidence she had been strangled first. Investigators found a large, bloody wrench approximately than 10 feet from the body. Defendant's palm print was embedded in the blood on the wrench. DNA testing confirmed that the blood belonged to Raspberry.

Police contacted defendant several times after Raspberry was reported missing. We describe his October 16, 2001 interview with Detective Jay Scofield in detail below.

Defendant telephoned Freeman from jail after his arrest. He chided Freeman, "You didn't have to say nothing Billy. . . . You said . . . you'd take it to your grave." Freeman explained, "I couldn't do it . . . . It would have haunted me for the rest of my life." He asked defendant not to hate him. Defendant responded, "Bye Billy."

At trial, the defense was alibi. Defendant and other defense witnesses described a timeline that included Raspberry driving defendant back to Stockton in the early afternoon of October 6. The defense also challenged the credibility of two key prosecution witnesses -- Kline and Freeman.

DISCUSSION

I

Defendant's Statements To Police

At trial, Detective Scofield testified that he interviewed defendant at the Stockton Police Department after his arrest on October 16, 2001. Scofield said he questioned defendant about his relationship with Raspberry. Defense counsel objected "as to foundation," and proceeded to voir dire the witness "on the *Miranda* issue." Scofield stated that he read defendant his rights off the "*Miranda* card." Although he recalled there were four rights listed on the card, he could repeat only two of them from memory at trial. Scofield nonetheless testified that defendant indicated he understood his rights, did not ask for an

attorney, and continued to talk to him. The trial court overruled defense counsel's objection.

Thereafter, Detective Scofield testified that he drove defendant to the area where defendant said he had smoked marijuana with Raspberry on October 6th. While other officers searched for evidence of the missing woman, Scofield continued to speak with defendant in the patrol car. Defendant told Scofield, "I know I'm lying, you know I am lying, I am not gonna tell you anything." When Detective Scofield asked defendant why he said that, defendant responded it was "because he was scared of what was going to happen to him." Defense counsel interjected another objection based on foundation, apparently questioning Scofield's use of his report to refresh his recollection. The trial court overruled that objection as well. Scofield added that defendant had said that "he was afraid he was going to go away for a long time."

Defendant contends that the admission of these statements violated his constitutional right against self-incrimination and his right to counsel under *Miranda v. Arizona* (1966) 384 U.S. 436 [16 L.Ed.2d 694]. Ignoring key portions of Scofield's testimony, defendant argues the record fails to establish by a preponderance of the evidence that defendant was properly advised or waived his *Miranda* rights.

"To assure protection of the Fifth Amendment privilege against self-incrimination, 'a suspect may not be subjected to an interrogation in official "custody" unless he has previously been advised of, and has knowingly and intelligently waived, his

rights to silence, to the presence of an attorney, and to appointed counsel if he is indigent. . . . Statements obtained in violation of *Miranda* are not admissible to establish his guilt.' [Citation.]" (*People v. Esqueda* (1993) 17 Cal.App.4th 1450, 1480-1481 (*Esqueda*); see also *People v. Sapp* (2003) 31 Cal.4th 240, 266 [citing both state and federal law].)

"An express written or oral statement of waiver of the right to remain silent or of the right to counsel is usually strong proof of the validity of that waiver, but is not inevitably either necessary or sufficient to establish waiver. The question is not one of form, but rather whether the defendant in fact knowingly and voluntarily waived the rights delineated in the *Miranda* case. As was unequivocally said in *Miranda*, mere silence is not enough. That does not mean that the defendant's silence, coupled with an understanding of his rights and a course of conduct indicating waiver, may never support a conclusion that a defendant has waived his rights. The courts must presume that a defendant did not waive his rights; the prosecution's burden is great; but in at least some cases waiver can be clearly inferred from the actions and words of the person interrogated." (*North Carolina v. Butler* (1979) 441 U.S. 369, 373 [60 L.Ed.2d 286, 292].) "Only if the 'totality of the circumstances surrounding the interrogation' reveal both an uncoerced choice and the requisite level of comprehension may a court properly conclude that the *Miranda* rights have been waived." (*Moran v. Burbine* (1986) 475 U.S. 412, 421 [89 L.Ed.2d 410, 421].) "[A]n express waiver is not

required where a defendant's actions make clear that a waiver is intended. (*People v. Whitson* (1998) 17 Cal.4th 229, 250 (*Whitson*).)

"We must accept the trial court's resolution of disputed facts and inferences, and its evaluations of credibility, if they are substantially supported. [Citations.] However, we must independently determine from the undisputed facts, and those properly found by the trial court, whether the challenged statement was illegally obtained. [Citation.]" (*People v. Boyer* (1989) 48 Cal.3d 247, 263 (*Boyer*), overruled on other grounds in *People v. Stansbury* (1995) 9 Cal.4th 824, 830, fn. 1.)

Defendant's claim that he was not properly advised of his *Miranda* rights is based on the assertion "the record fails to disclose what specific rights were read to [him]." However, Detective Scofield testified he read defendant his rights off the "*Miranda* card." He recalled there were four rights specified on the card. The trial court could reasonably infer from this testimony that Scofield properly advised defendant of his rights under *Miranda*. (*Boyer*, *supra*, 48 Cal.3d at p. 263.) The fact Scofield could not recite the four *Miranda* rights from memory at trial does not detract from testimony that he read them from the card at the start of his interview with defendant. His lapse of memory simply demonstrates why law enforcement officers routinely read the *Miranda* rights from a card rather than rely on memory.

We also reject defendant's argument that the trial court's implied finding of waiver is unsupported by the record. Defendant's actions demonstrate that waiver was intended. (*Whitson*, *supra*, 17 Cal.4th at p. 250.) Scofield testified that defendant indicated he understood his rights. Thereafter, defendant continued to talk to Scofield. At no time did he refuse to talk to the detective or ask for an attorney. Based on the totality of the circumstances, we conclude defendant knowingly and voluntarily waived his *Miranda* rights. (*North Carolina v. Butler*, *supra*, 441 U.S. at p. 373.)

In light of the foregoing conclusions, we need not address defendant's alternative claim that there is no evidence defendant's statements to Scofield were "sufficiently attenuated from the *Miranda* violation to allow their admission at trial."

II

Limitation on the Impeachment of Billy Freeman

Defendant contends that the trial court violated his federal and state constitutional rights by restricting his examination of Billy Freeman. He insists his questions about past misdemeanor conduct involving moral turpitude were proper impeachment under Proposition 8, the Truth-in-Evidence provision of the California Constitution. (Cal. Const., art. 1, § 28, subd. (d).) Defendant argues that "[t]he details of Freeman's prior criminal conduct -- that he had falsified a police report, resulting in the arrest of another person -- were highly relevant to his credibility." He suggests that "Freeman had knowledge of the details of Raspberry's death, which were

unavailable to the public at the time he told police that [defendant] had confessed. A credible, alternative explanation for Freeman's knowledge was that he was involved in the killing."

The Attorney General concedes the trial court erred in restricting defendant's introduction of impeachment evidence under Proposition 8, Evidence Code section 1101, subdivision (b), and *People v. Wheeler* (1992) 4 Cal.4th 284, 300. We conclude the error was harmless under either the federal or state standard.

Freeman testified on behalf of the prosecution that defendant confessed to killing Raspberry by hitting her in the head with a wrench. He recounted details of the crime as described by defendant. Later in the trial, the defense called Freeman as a witness. Defense counsel began by asking Freeman if he had ever falsified a police report. The prosecutor promptly objected that the question was irrelevant. The court sustained the objection. Defense counsel's examination continued:

"[Defense Counsel]: Mr. Freeman, have you ever asked anybody to lie for you?

"A. In my entire life?

"Q. Yes.

"A. I probably have when I was a kid and maybe a teenager. I don't remember. As an adult, I haven't really ever asked anybody to lie for me, I don't think.

"Q. Have you ever asked Jason Cates to lie for you?

"A. Yes, I did.

"Q. Can you tell us when that was?

"A. I don't know how many years ago, but I got into a little bit of trouble with Jason with me, I asked him not to say nothing.

"Q. In fact, did you ask him to take the blame?

"A. No.

"Q. And you didn't tell the police that he was the one that –

"A. That what?

"Q. – committed the crime.

"A. No. I took the full blame. I'm sorry that he was even with me."

Thereafter, the defense called defendant's son, Jason Cates, to the witness stand. The following exchange took place:

"[Defense Counsel]: Has [Freeman] ever asked you to lie for him?

"A. Not that I can really remember, but he's tried to pawn stuff on me before.

"Q. What do you mean by that?

"A. Like there was once where I went to the dump with him, and he had stolen money."

The prosecutor objected under "787, 1101" but was overruled. Jason Cates continued:

"A. Okay. Yeah. We went to the dump when I was about 14, and he had stolen some money from the dump, and he tried to blame it on me. I had to go down to juvenile hall and talk to

them, and they kept telling me that I did it when I didn't. And I think – I don't – I'm not sure if he pleaded guilty to it or not, I don't know. But I had two years probation because of it.

"Q. You got two years probation?

"A. Yeah. Well, so they told me."

The court sustained the prosecution's hearsay objection.

Thereafter, defense counsel placed the following offer of proof on the record: "[S]everal years ago, Mr. Freeman stole some money from a – the dump. . . . And then when he was caught, he blamed it on Jason Cates and made a report as such, and Jason was arrested for doing that and then ended up that Mr. Freeman got convicted on it." The trial court ruled "under 1101 that's inadmissible, under 1101(a) of the Evidence Code." It added, "Unfortunately, thereafter, certain testimony came in without objection, and the Court's reason is that it was just pure impeachment testimony then."

The record clearly shows that in spite of the trial court's evidentiary rulings, defendant's impeachment evidence was before the jury. Freeman and Cates described the incident in the same terms as defense counsel in his offer of proof. Any additional impeachment evidence would have been duplicative. Moreover, defendant's bloody palm print on the wrench found near the victim is strong evidence of his guilt.

It is not reasonably probable under state law that the result would have been different had the court overruled the prosecution's objections. (*People v. Watson* (1956) 46 Cal.2d 818, 836.) The restriction on defense counsel's examination of

Freeman violated the federal Constitution only if a reasonable jury might have received "a significantly different impression" of Freeman's credibility had counsel been allowed to ask the questions he wanted. (*Delaware v. Van Arsdall* (1986) 475 U.S. 673, 680 [89 L.Ed.2d 674, 684]; *People v. Hillhouse* (2002) 27 Cal.4th 469, 494.) Defendant fails to demonstrate a constitutional violation.

III

Cumulative Error

"'The litmus test' for cumulative error 'is whether defendant received due process and a fair trial.'" (*People v. Cuccia* (2002) 97 Cal.App.4th 785, 795.) Having concluded the court did not err in admitting defendant's statements and the error in restricting impeachment was harmless, we reject defendant's claim cumulative error requires reduction of the judgment to second degree murder. (See *People v. Koontz* (2002) 27 Cal.4th 1041, 1094.)

DISPOSITION

The judgment is affirmed.

MORRISON, J.

We concur:

SCOTLAND, P.J.

SIMS, J.